No. 22-15705

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEJANDRO TOLEDO MANRIQUE,
Petitioner-Appellant,

v.

MARK KOLC, Acting United States Marshal for the Northern District of California,
Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of California.
No. 21-cv-08395-LB

APPELLANT'S MOTION FOR PANEL AND EN BANC RECONSIDERATION

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INTRODUCTION

Peru seeks the extradition of 78-year-old former President Alejandro Toledo, even though he has never been formally charged with a crime. Peru submitted its extradition request to the United States in May 2018 and the extradition court certified Toledo's extradition on September 28, 2021.[1] Toledo petitioned for habeas relief from the extradition court's decision,[2] but his petition was denied. He then timely appealed the denial of his habeas petition to this Court. On February 21, 2023, while Toledo's appeal was pending, the State Department notified Toledo that it intends to grant Peru's extradition request. Toledo immediately moved for a stay of extradition pending the Court's resolution of his appeal.

On April 5, 2023, a merits panel issued a published order denying Toledo's motion. *See* Order, attached hereto as Exhibit A. The Court found it "obvious" that denying the stay will cause Toledo irreparable harm, not just because extradition will moot his appeal before it is decided on the merits, but also because of the danger that Toledo will contract a fatal illness in a Peruvian prison before he can be formally charged, much less brought to trial. *See id.* at 7. The Court nevertheless denied the

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[1] The extradition process is "shared between the executive and judicial branches." *Santos v. Thomas*, 830 F.3d 987, 991 (9th Cir. 2016) (en banc). The extradition court (usually a federal magistrate) is responsible for determining whether an individual is eligible for extradition; if so, the court certifies the extradition to the State Department, which makes the final decision whether to extradite. *Id.*

[2] There is no direct appeal from an extradition court's certification order, but it can be "challenged collaterally" via a habeas petition, *Prasoprat v. Benov*, 421 F.3d 1009, 1013 (9th Cir. 2005).

stay, on the ground that Toledo's appeal does not raise "serious legal questions." *Id.* Toledo now seeks panel and en banc reconsideration.

Although the Order is not technically a decision on the merits, it includes an extensive discussion of the merits of Toledo's appeal. And because the Order is published, it creates binding precedent, not only regarding the procedural law applicable to extradition-related stays, but also regarding the substantive question at the hearing of Toledo's appeal: under what circumstances can the United States extradite an individual who has never been formally charged with a crime?

The Order concludes that Peru is not required to formally charge Toledo with a crime, even though the U.S.-Peru extradition treaty[3] applies only to individuals who have been "charged with" an extraditable offense, and even though the treaty requires the requesting country to produce a copy of "the charging document." *See* Exh. A at 8-13. The Order creates a circuit split with the First Circuit, which reached the opposite conclusion construing a treaty with identical language. *See Aguasvivas v. Pompeo*, 984 F.3d 1047 (1st Cir. 2021). The parties discussed *Aguasvivas* extensively in their briefs, but the Order does not mention *Aguasvivas*, much less distinguish it.

The fact that the panel and the First Circuit gave opposite answers to the same question demonstrates that Toledo's appeal raises a "serious legal question." And the Order's implications extend far beyond Toledo's case or even other cases involving the U.S.-Peru Treaty. The United States currently has extradition treaties with 116

[3] Extradition Treaty Between the United States of America and the Republic of Peru (the "Treaty"), July 26, 2001, 2001 WL 1875758.

countries, *see* U.S. State Dep't, *Treaties in Force* (Jan. 1, 2020).[4] When a court construes one extradition treaty, its decision is used to construe similar language in other treaties. For all of these reasons, panel and en banc reconsideration and are warranted and a stay must issue.

BACKGROUND

I. Peru asks the United States to extradite Toledo even though he is not charged with a crime.

In June 2001, Alejandro Toledo was elected President of Peru. His election marked the beginning of what the U.S. State Department characterized as "a process of democratic transformation" for a country that had spent the previous decade under a brutal dictatorship. A cornerstone of Toledo's administration was the construction of the Interoceanic Highway – a highway stretching across South America from the Atlantic Ocean to the Pacific. Ronald Bruce St. John, *Toledo's Peru: Vision and Reality* 50-51 (2010).

Toledo's presidential term concluded in 2006. More than a decade later, Peruvian prosecutors initiated a preliminary investigation[5] into claims that Odebrecht, a

[4] state.gov/wp-content/uploads/2020/08/TIF-2020-Full-website-view.pdf.

[5] In Peru, a criminal case begins with a preliminary investigation during which prosecutors gather and evaluate evidence – both inculpatory and exculpatory – to determine whether to seek charges. Exh. A at 8; 2-ER-253. If, at the end of the preliminary investigation, prosecutors decide to seek charges, the case proceeds to the intermediate stage, during which a court decides whether to grant the request. If, at the conclusion of the intermediate stage, the court agrees that charges are warranted, the court issues a formal charging document called the *Orden de Enjuiciamiento*. The case then proceeds to the third stage: trial. Exh. A at 8.

Brazilian construction behemoth, had bribed Toledo to secure favorable treatment in the bidding process for Interoceanic Highway contracts. 4-ER-793. On May 25, 2018, while the preliminary investigation was ongoing, Peru requested that the United States extradite Toledo in connection with the bribery allegations, even though no charges were pending against him.

II. Toledo is arrested and spends months in solitary confinement despite the absence of any charges.

When Peru made its extradition request, Toledo was living openly in the San Francisco Bay Area and teaching at Stanford University. Nonetheless, the United States took no action on Peru's request for more than a year. On July 15, 2019, the United States filed a complaint for Toledo's provisional arrest. 3-ER-531. The next day, Toledo was arrested and remanded. He spent the next eight months in custody – including three months in solitary confinement because the jail concluded this was the only way to guarantee the safety of such a high-profile person – before being released on bail in March 2020.

III. The extradition court rules that the Treaty allows for extradition even though there are still no formal criminal charges.

On July 20, 2020, Toledo moved to deny Peru's extradition request because the Treaty prohibits extradition of individuals who have not been formally charged with a crime. XR-137.[6] Toledo explained that under Peru's code of criminal procedure, a

[6] "XR" refers to the docket of the underlying extradition case, *Matter of Extradition of Toledo Manrique*, No. 19-mj-71055-MAG (N.D. Cal.); "CR" refers to the docket of the habeas case, *Toledo Manrique v. O'Keefe*, No. 21-cv-08395-LB (N.D. Cal.); "CA" refers to the appellate docket.

formal charging document (called the *Orden de Enjuiciamiento*) cannot be issued until both the preliminary and intermediate stages of the case conclude. In Toledo's case, Peru had not yet completed the preliminary investigation, much less the intermediate stage.[7] *Id.*

In its response, the government did not dispute that a person must be "charged" to be extradited, but argued that Peru's prosecutors had effectively charged Toledo by filing two Prosecutor's Decisions. XR-140. The purpose of these Prosecutor's Decisions, however, was simply to initiate and extend the preliminary investigation. *See* 4-ER-689; 4-ER-793.

A few days later, Peru's prosecutors held a press conference to announce they would end the preliminary investigation early as a way to "disrupt" Toledo's extradition challenge in the United States. 2-ER-192-93. Shortly thereafter, the prosecutors filed the *Acusación Fiscal*, a document that prompts the start of the intermediate stage. The government did not argue that the *Acusación Fiscal* was "the charging document" for purposes of the Treaty. 2-ER-133-179.

On September 4, 2020, the extradition court denied Toledo's motion. 1-ER-59. The court agreed that the *Orden de Enjuiciamiento* is the only formal charging document used in Peru, but concluded that no formal charges were required. Instead, the court held that the Treaty's charging and charging-document requirements were satisfied by the Prosecutor's Decisions. Notably, the court did not base its finding on the *Acusación Fiscal*. *See id.*

[7] Even now the case remains in the intermediate stage. As the Order notes, it could be years before any formal charges are brought. *See* Exh. A at 7.

IV. The extradition court denies Toledo's probable cause challenge and certifies Toledo's extradition to the Secretary of State.

On July 8, 2021, Toledo moved to deny extradition for lack of probable cause. XR-170. Toledo pointed out that Peru's case rested almost entirely on the statements of two self-serving witnesses, one of whom had entered into a cooperation agreement in which Peru gave him immunity and promised that he could keep $20 million that Peru had identified as bribe money. 3-ER-507.

The extradition court found that "[t]he case against Toledo is not airtight"; that Peru's witnesses contradicted themselves and each other; that Peru's prosecutors had officially rejected one witness's account, creating "fertile ground" to question his testimony; and the other witness's "willingness to lie ... generally undercuts his credibility as a witness." 1-ER-53-58. Nonetheless, the court concluded that these issues did not defeat probable cause, and that in any event Toledo would have the opportunity to vigorously cross-examine the witnesses at trial in Peru.[8] *Id.* On September 28, 2021, the court certified Toledo's extradition to the Secretary of State. 1-ER-29.

On October 28, 2021, Toledo petitioned for habeas relief under 28 U.S.C. § 2241. SER-2. The filing of the habeas petition automatically stayed Toledo's extradition while the petition was pending. The habeas court denied the petition on April 22, 2022. 1-ER-2. On May 9, 2022, Toledo timely appealed. 5-ER-980. The habeas

[8] Josef Maiman – the witness who was allowed to keep $20 million in return for his cooperation – has since died, meaning that Toledo will never have the opportunity to cross-examine him.

court granted a temporary stay to allow Toledo to seek a stay of extradition from this Court pending resolution of his appeal. CR-30.

V. A motions panel summarily denies Toledo's motion for a stay of extradition pending his appeal.

On June 21, 2022, Toledo moved this Court for a stay pending appeal. CA-4. The motion was summarily denied by a motions panel on October 19, 2022. CA-22. At that point, the State Department was free to extradite Toledo. It did not do so, however, because it had not yet made a decision whether to grant Peru's request.

In the meantime, appellate briefing was completed and the case was set for oral argument.

VI. The State Department announces it intends to grant Peru's request and extradite Toledo.

On February 21, 2023, less than two weeks before oral argument, the State Department notified Toledo that it intends to grant Peru's extradition request. Toledo immediately filed a renewed motion for a stay pending resolution of his appeal. CA-41. In his motion, Toledo explained that the State Department's announcement was a significant change in circumstances. Until then, it was still possible that the State Department would decide against extradition. Indeed, the government had argued that the lack of a decision from State defeated Toledo's earlier stay request. Now, though, the State Department's decision was made.

VII. The merits panel issues a published Order denying Toledo's renewed request for a stay of extradition pending appeal.

The Court heard oral argument on March 6, 2023. Although the primary purpose of oral argument was to address the merits of Toledo's appeal, the Court asked the parties several questions about Toledo's request for a stay. On April 5, 2023, the merits panel issued a published Order denying Toledo's motion for a stay pending resolution of his appeal. Exh. A. The panel concluded that although Toledo would be irreparably injured absent a stay, he had failed to demonstrate that his appeal presented a serious question on the merits. *Id.* The Court granted a 14-day stay to allow Toledo to seek panel and en banc reconsideration. CA-51, 53.

ARGUMENT

Courts weigh four factors to decide whether to grant a stay: (1) whether the applicant will be irreparably injured absent a stay; (2) whether the applicant has shown either a "substantial case for relief on the merits" or that the case raises "serious legal questions"; (3) whether a stay will substantially injure other parties; and (4) where the public interest lies. *Leiva-Perez v. Holder,* 640 F.3d 962, 964 (9th Cir. 2011) (citation omitted). The Court "balance[s] the relative equities of the stay factors," and "a stronger showing of one element may offset a weaker showing of another." *Id.* at 964-65. (citation omitted). The combination of a "serious questions on the merits" and "a hardship balance that tips sharply toward" the applicant is enough to merit a stay. *Id.* at 966 (cleaned up).

Here, there is no question that the "hardship balance tips sharply toward" Toledo. As the panel recognized, not only will the denial of a stay render Toledo's appeal moot, but it will put his life in danger. Exh. A at 7.[9] The only real issue is whether Toledo's appeal presents a serious question on the merits. It does.

I. The panel's conclusion that the Treaty does not require formal charges is erroneous and creates a circuit split.

The plain language of Article I of the Treaty restricts extradition to "persons whom the authorities have [1] charged with, [2] found guilty of, or [3] sentenced for, the commission of an extraditable crime." Treaty, art. I. In addition, Article VI of the Treaty requires the requesting country to produce a copy of "the charging document." Treaty, art. VI(3)(b).

The panel concluded that phase "charged with" does not mean "formally charged," but can encompass anyone who is "sought for prosecution." Exh. A at 9-12. The panel began by noting that "the ordinary meaning of the *verb* 'charge' is to generally accuse someone of a crime." Exh. A at 9 (citing Black's Law Dictionary (11th ed. 2019)) (emphasis added). But the panel offered no reason to prefer this

[9] The panel concluded that denying the stay serves the public interest in honoring valid extradition requests. Exh. A at 14-15. But a stay would not prevent this. If, after Toledo's case has been fully litigated, the Court determines that the Treaty permits Toledo's extradition, Peru's request can be granted. The only hardship to Peru will be a relatively minor delay. If, on the other hand, the Court determines that the Treaty forbids Toledo's extradition, the stay will have served the public's interest in preventing an extradition that violates the Treaty.

definition over the definition of the *noun* "charge," which Black's Law Dictionary defines as a "formal accusation of an offense."[10]

Next, the panel pointed to Article VI of the Treaty, which identifies the documents – including "the charging document" – that the requesting country must provide when "a person is sought for prosecution." Exh. A at 10. The panel concluded that Article I's "charged with" must be read in conjunction with Article VI's "sought for prosecution," a phrase that "seems to reach more broadly and encompass charging steps prior to the *Orden de Enjuiciamiento*." *Id.* But if the drafters had intended Article I to include people who are merely "sought for prosecution," they would have used that language in Article I itself, as the United States had done in other extradition treaties. *See, e.g.,* Extradition Treaty Between the Government of the United States of America and the Government of Belize, Mar. 30, 2000, 2000 WL 33366018, art. I; Extradition Treaty Between the Government of the Government of the United States of America and the Republic of Korea, June 9, 1998, 1998 WL 1788076, art. I; Extradition Treaty, U.S.-Japan, Mar. 3, 1978, 1980 WL 309098, art. I. "We must assume that the representatives of the United States had these clauses before them when they negotiated the treaty." *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 13 (1936).[11]

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[10] Technically, the word "charged" in Article I is neither a verb nor a noun; it is a past participle, used as an adjective. *See Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 84 (2017).

[11] It is also unclear why "sought for prosecution" should be read to broaden "charged with," instead of reading "charged with" to narrow "sought for prosecution." Imagine if Article I of the Treaty stated that the treaty applied only to

Finally, the panel pointed to two earlier cases that "reached a similar conclusion" interpreting "similar treaties." Exh. A at 10 (citing *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980), and *Emami v. U.S. Dist. Ct. for the Northern Dist. of Cal.*, 834 F.2d 1444 (9th Cir. 1987)). Not only is this a misreading of *Assarsson* and *Emami*, but it creates a direct conflict with the First Circuit.

In *Assarsson*, the Seventh Circuit construed the U.S.-Sweden extradition treaty. *Assarsson*, 635 F.2d at 1239. Sweden had not formally charged the petitioner, and he argued that because the treaty applied only to people "charged with or convicted of" an extraditable offense, Sweden's intention to charge him with a crime sometime in the future was insufficient. *Id.* The Court disagreed, relying on the fact that the treaty did not require the requesting country to produce a copy of the charging document. The Court reasoned that "no better evidence of a 'substantive' requirement of a charge exists than a copy of the 'charge' itself. Since the parties chose not to require production of the charge document, we can easily infer that they did not require the 'substance' of a charge either." *Id.* at 1243.

Emami, in turn, construed the U.S.-Germany extradition treaty. *Emami*, 834 F.2d at 1446. Like the treaty in *Assarsson*, the U.S.-Germany treaty applied only to people "charged with" or convicted of an extraditable offense. And like the treaty in *Assarsson*, the U.S.-Germany treaty had no charging-document requirement. *Id.* at 1448. Relying on *Assarsson*, the Court concluded that extradition was permitted even

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law students, and Article VI listed the documents required for cases involving "individuals still in school." The logical conclusion would be that "individuals still in school" means "individuals still in *law school*," not that "law students" includes any individual who is "in school."

in the absence of formal charges because the charging document "was absent from the list of [the treaty's] required documents." *Id.*

As both *Emami* and *Assarsson* make clear, the meaning of the word "charged" in Article I is informed by the meaning of "the charging document" in Article VI. Because the treaties in those cases omitted the charging-document requirement, the courts read "charged" broadly to include people who are merely "suspected" (*Assarsson*) or under "investigation" (*Emami*). If the treaties had included a charging-document requirement, it "would have resulted in a different outcome." *Aguasvivas v. Pompeo*, 405 F. Supp. 3d 347, 355 (D.R.I. 2019), *aff'd in relevant part*, 984 F.3d 1047 (1st Cir. 2021). When a treaty requires a charging document, "charged" cannot encompass anyone who is suspected or under investigation; it is limited to people who are the subject of formal charges, as demonstrated by the existence of "the charging document." In the American federal system, that document is the Indictment. Fed. R. Crim. P. 7(a). In the Peruvian system, it is the *Orden de Enjuiciamiento*.

This analysis is confirmed by the First Circuit's opinion in *Aguasvivas*. There, the court construed the U.S.-Dominican extradition treaty which, like the U.S.-Peru Treaty, includes a charging-document requirement. *Aguasvivas*, 984 F.3d at 1060. *Aguasvivas* squarely held that when a treaty requires a copy of "the charging document," it cannot be satisfied by a request to extradite "in anticipation of a possible, yet-to-be determined prosecution." *Id.* at 1058. Instead, such a treaty requires formal charges, and a formal charging document. The Court explained that it "readily agree[d] with the holdings and the rationale in both *Emami* and *Assarsson*," and that it "could rule for the government in this case were the language of this treaty

materially similar to the language of those treaties." *Id.* at 1060. But, the Court continued, the U.S.-Dominican treaty "adds to the list of required documents a requirement that was missing in those earlier treaties: 'the document setting forth the charges.'" *Id.* "For that reason," the Court concluded, "our agreement with the holdings in *Emami* and *Assarsson* provides no succor for the United States in this case." *Id.* The Court added that the contrast between the U.S.-Dominican treaty and the treaties in *Emami* and *Assarsson* was particularly compelling since "the State Department is presumably familiar with the various treaty forms that it has adopted and with circuit law construing those forms." *Id.*

The same is true here. Previous versions of the U.S.-Peru treaty lacked a charging-document requirement. 2-ER-186. Drafters are assumed to be "aware of relevant judicial precedent," *Merck & Co., Inc. v. Reynolds*, 569 U.S. 633, 648 (2010), and according to international extradition expert Bruce Zagaris, the negotiators of the current Treaty "would have known of" *Emami* and *Assarsson*. 2-ER-186. Richard J. Douglas, who was Chief Republican Counsel for the Senate Foreign Relations Committee when the Treaty was drafted, confirms that this was, in fact, the case. 2-ER-196-97.

The panel makes no effort to distinguish *Aguasvivas*, the case most directly on point. Indeed, the Order does not even mention *Aguasvivas*, even though the parties' briefs addressed it at length. The fact that the panel and the First Circuit reached opposite conclusions demonstrates that this is a "serious legal question on the merits." It also demonstrates why reconsideration is necessary. *See United States v.*

Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987) ("[A]bsent a strong reason to do so, we will not create a direct conflict with another circuit.").

II. The Court should grant a temporary stay to allow sufficient time to consider Toledo's en banc request.

If the panel had issued a decision on the merits rather than an Order, Toledo would have had 45 days to petition for rehearing. Fed. R. App. P. 40(a)(1)(A). Any off-panel judge would then have 21 days to request notice of the panel's vote on the petition. G.O. 5.4(b)(1). The panel would then have 90 days to respond. G.O. 5.4(b)(2). After that, judges would have 14 days to call for a vote on whether to grant the petition for rehearing. *Id.* Even if the Court voted to deny the petition, the mandate would not issue for another 7 days. Fed. R. App. P. 41(b).

Instead, Toledo has been granted a 14-day stay. CA-49. The Court has set an expedited briefing schedule so that Toledo's motion, the government's response, and Toledo's reply all can be filed within 12 days. CA-54. This leaves only 2 days for a deliberative process that would ordinarily take at least 21 days.

A temporary stay will allow Toledo's case to be "fully litigated." *See Where Do We Go Berkeley v. Cal. Dep't of Transp.*, 32 F.4th 852, 858 (9th Cir. 2022). It will also provide the Court with sufficient time to consider Toledo's motion before Toledo is irreparably injured.

CONCLUSION

For all the reasons set forth above, Appellant Alejandro Toledo respectfully requests that the Court grant his move for panel and en banc reconsideration. In addition, he requests that the Court extend its temporary stay for at least 21 days to allow members of the Court to make a request pursuant to General Order 5.4(b)(1). In the event such a request is made, Toledo asks that the Court extend the stay until it rules on the motion for reconsideration.

Respectfully submitted,

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April 13, 2023

s/ Mara K. Goldman
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 and Circuit Rule 40(b)(1), I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,893 words.

April 13, 2023

s/ Mara K. Goldman

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